No. 7,323

United States
Circuit Court of Appeals
For the Ninth Circuit

Bernhard Davidow,

Appellant,

vs.

Lachman Bro's Investment Co., a corporation; G. P. Anderson; Title Insurance & Guaranty Co., a corporation; Corporation of America, a corporation; Bank of America of California, a corporation; Bank of America National Trust & Savings Association, a corporation,

Appellees.

Brief for Appellant

Upon Appeal from the District Court of the United States for The Northern District of California, Southern Division.

HERBERT N. DEWOLFE
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Attorney for Appellant

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BRIEF FOR APPELLANT

Upon Appeal from the District Court of the United States for The Northern District of California, Southern Division.
Honorable Frank H. Kerrigan, Judge.

I.

ASSIGNMENTS OF ERROR

This is an appeal from a final decree. Defendants below interposed motions to dismiss plantiff's bill of complaint. Both motions were based upon the same grounds: (1) That the bill failed to state a cause of action, and (2) That the court was without jurisdiction as no Federal question was involved. (Trans. 47-48). The court granted these motions (Trans. 51). The hearing in this court will be upon the sufficiency of the bill to withstand these two objections, and further, that the court erred in refusing to appoint a receiver *pendente lite*. (Trans. 45).

We are somewhat at a loss to understand the position of the court below, as Judge Kerrigan at no time expressed an opinion upon any question involved.

II.

STATEMENT OF FACTS

The bill alleges the following facts, which are admitted:

(1). THE FIRST CAUSE OF ACTION

(Transcript p. 4)

On June 17th, 1930, appellant was the owner of two pieces of real property, one a four story brick business block in the City of San Francisco, of the approximate value of $300,000, having a lease income of $1,380 per month; and a country estate in Napa County of the value of $200,000. Upon that date he delivered his first deed of trust in blanket form to both properties to Corporation of America, trustee, to secure his promissory note in the sum of $150,000, due one year after date, to Bank of America of California, beneficiary. This deed of trust is attached to the bill as "Exhibit A". (Trans. p. 26). It is still executory. (Par. VII, Trans. p. 9.)

Thereafter, and upon July 15th, 1930, (although dated May 10th, 1930) appellant delivered his second deed of trust in blanket form to these same properties to Title Insurance & Guaranty Co., trustee, to secure his note in the sum of $25,000, due six months after date to G. P. Anderson, beneficiary. (Trans. p. 33, "Ex. B"). Anderson had no financial interest in the matter but was merely acting as a dummy for appellee Lachman Bros. Investment Co. (hereinafter called Lachman) (Trans. p. 10.)

Upon February 20th, 1931, appellee Anderson instituted execution proceedings upon her security, appellant's second deed of trust, by recording her notice that appellant had defaulted in the payment of his promissory note and of her election to sell the property covered by said second deed of trust to satisfy her $25,000 note. The proceedings were conducted in accordance with California Civil Code Section 2924 (Pars. X and XI, Trans. pp. 14, 15).

Thereafter, upon instructions from the beneficiary, the trustee, Title Insurance & Guaranty Co. (hereinafter called the second trustee) proceeded with the execution of said deed of trust. In so doing it followed, literally, the provisions and requirements of said C. C. 2924 (Trans. p. 15). The notices posted and published by the trustee, under C. C. P. 692, recited that the real property described would, upon certain days and at certain places, be offered for sale and sold to the highest bidder to satisfy the $25,000 indebtedness of plaintiff. Two separate and distinct notices of sale were given, one in each of the counties where the properties were situate, and only the property located in the county where the notice was given was described in that notice, and no reference whatsoever to the sale of the other property covered by the deed of trust was mentioned, referred to or described in that notice. Such notice, it is alleged, being insufficient, caused the sale thereunder to be an unlawful "taking" contrary to Amendment XIV of the Federal Constitution (Trans. 18). Neither of said notices of sale referred to the first deed of trust then outstanding against said properties. (Trans. p. 16.) The San Francisco property was stricken off to the appellee Anderson, the nominal beneficiary, for the sum of $15,000, and the Napa County estate

for $5,000. (Trans. p. 12.) Thereafter the trustee executed its conveyance of the title held by it to appellee Anderson to both of said properties. (Trans. 15-16.) A copy of this conveyance is attached to the bill as "Exhibit C." (Trans. p. 40.)

Thereafter Anderson conveyed the interest derived from the trustee to appellee Lachman, the real beneficiary. (Par. XII, Trans. p. 16). A copy of this conveyance is attached to the bill as "Exhibit D". (Trans. p. 42.) Appellee Lachman was the holder of that interest at the time the bill was filed in the court below.

Appellee Lachman took possession of the San Francisco property February 1st, 1932. (Trans. p. 20). At that time the leasehold income from this property was in the approximate sum of $1,380 per month. Lachman has collected these rentals from that time and has never accounted to appellant therefor. (Trans. p. 20, Par. XV.)

Upon this showing appellant applied to the lower court for the appointment of a receiver *pendente lite* to collect and disburse these moneys under the direction of the court. (Trans. p. 44.) The application was denied. (Trans. p. 45.)

This cause of action shows and alleges that all the proceedings had and done by the beneficiary and trustee in the execution of the second deed of trust followed, literally, the procedure enacted by the California legislature for the execution of deeds of trust, the same being Civil Code Section 2924 and C. C. P. 692. (Trans. Pars. X, XI, pp. 14, 15.)

The second trustee, in following this procedure for the purpose of executing its second or subordinate deed of trust, while

the first trust deed was still outstanding as an executory contract, ran afoul Section 1, of Amendatory Article XIV of the Federal Constitution, being the taking of appellant's property without due process of law (Trans. 17, Par. XIII). The supposed laws as construed by the trustee and beneficiary and all attempted proceedings under them were void. One conclusion being for the reason that under the authority of said Civil Code Section 2924 the Notices of Sale recited that the trustee would *sell the property* when, as a matter of law, it had no vested title to the property. (Trans. p. 17-18, Par. XIII.) Also on the further ground that the notice was insufficient to warrant a sale.

This cause of action further alleges that Civil Code Section 2924 is, in itself and upon its face, in conflict with the Federal Constitution for the reason that it authorizes the selling of the whole property when only "an estate" therein has been transferred as security. (Par. XIII, Trans. 17-18.)

Two distinct promises to renew this second loan, based upon good and sufficient considerations, were made by the officer of Lachman Bros. Investment Co., who negotiated and handled this loan, Jack Rittigstein, its Vice-President and acting Secretary. After receiving and retaining these considerations Lachman breached both of its said agreements, showing that it made the same without any intention of fulfilling its promises. (Par. VIII, Trans. pp. 10-11: Par. IX, p. 13-14.)

The several acts and proceedings of the appellee Lachman from the breach of its contracts to renew its loan and all its actions thereafter to and including its acquistion of the legal title to the Napa County properties are set forth in the com-

plaint as fraudulent, deceitful, illegal, and intended only for the purpose of illegally acquiring the properties of appellant.

(2) THE SECOND CAUSE OF ACTION
(Trans. 21)

All the allegations of the first cause of action are incorporated in and made a part of the second cause of action by reference. (Trans. 21.)

This cause of action further shows that the first deed of trust was delivered to the first trustee as security for appellant's promissory note to appellee Bank of America of California in the sum of $150,000, due one year after June 17th, 1930, the date of its delivery.

On or about July 15th, 1932, Lachman approached the appellee Bank of America and offered to pay the sum of $25,000 for the release of the Napa County property to it by the first trustee. This offer was accepted by the appellee Bank and upon the last named date the first trustee delivered to Lachman its deed of conveyance of the Napa County properties. That deed was recorded in the office of the County Recorder for Napa County at the request of appellee Lachman upon July 19th, 1932, and is now of record in that county.

The negotiations for the Napa County property and the execution and delivery of the deed by the first trustee to Lachman and Lachman's recordation of the same, the complaint shows (Trans. 23), were all had and done without the knowledge or consent of appellant Davidow, the trustor under said first deed of trust.

(3) THE PRAYER FOR RELIEF
(Trans. 24)

The bill prays for decree of the court:

1. That none of the defendants has any interest in the properties.

2. That the payment of the $25,000 by Lachman to the Bank on appellant's $150,000 obligation be adjudged a voluntary payment.

3. That appellee Corporation of America be forever enjoined from executing appellant's first deed of trust.

4. That appellee Bank of America be enjoined from enforcing the collection of appellant's $150,000 promissory note.

5. That appellees be ordered and directed to surrender up for cancellation all the promissory notes, deeds of trust, etc., executed and delivered by appellant in order that the same may be destroyed.

6. That appellant be decreed to be the owner of the property situate in the City and County of San Francisco and that his grantee M. D. Frank be adjudged the owner of the Napa County properties. (The record now shows that the Napa County property has been re-conveyed to appellant and that he is now the owner thereof and that this action has been dismissed against the defendant M. D. Frank.)

7. This prayer asks the appointment of a receiver *pendente lite* to collect and disburse the rents from the San Francisco property under the direction of the court, and further that Lachman be ordered and directed to account to plaintiff for all rents collected by it from said premises up to the time of the

appointment of such receiver.

9. That appellant have and recover such further and additional relief as to the court may be deemed just and equitable, and his costs and disburstments.

III.

ARGUMENT

(1) INTRODUCTION

The facts in this case are undisputed. They are not complex but simple and easily comprehended. The law governing is likewise simple, easily comprehended, uniform and undisputable. The bill dismissed not only states a cause of action cognizable in equity but it alleges two such causes. Further, the Federal Question involved has been so often ruled upon by the United States Supreme Court that it is no longer an open question. However, with our sincere apologies to the Judge who dismissed the bill, had we presented our case in the lower court as it is presented here, we would probably now be on the other end of this appeal.

The case before us presents legal principles applicable to deeds of trust under the California laws. Since a deed of trust is given for the same purpose as a mortgage is given—real estate security for a loan—it will be necessary to distinguish fundamental principles in the two in order not to confuse the law governing in this case. All these rules of law have been definitely settled in this state so that it will be unnecessary to go into detail regarding them.

In the first place, it should be remembered that

> Real property within this state is governed by the law of this state, except where the title is in the United States. C. C. 755.

Also that a deed of trust is a conveyance and passes the title:

> Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. C. C. 863.

That a mortgage is an encumbrance and merely creates a lien:

> Mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession. C. C. 2920.

> A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale. C. C. P. 744.

> The term "encumbrances" includes taxes, assessments, and all liens upon real property. C. C. 1114.

See also: McMillan v. Richards, 9 Cal. 365;
Bank of Italy v. Bentley, 217 Cal. 644, 655; 20 P. 2d 940.

It is said in the case last cited:

> Although, as already pointed out, this state, at an early date, adopted the "lien" theory of mortgages, it adopted the "title" theory in reference to deeds of trust.

A power of sale in a mortgage is, in effect, a power-of-attorney whereby the donee conveys the title to the property from the owner, the mortgagor, to the purchaser:

> Goldwater v. Hibernia S. & L. Soc., 19 Cal. App. 511, 126 Pac. 861.

At first blush there appear to be two lines of decisions in California with reference to what title passes under a deed of trust. However, upon close study of these decisions it will be disclosed that while the conclusions in them all are correct, the theory in some of them is erroneous. The errors, when sifted down, consist in construing the trustee's title; also the possessory rights of a trustor. The rules governing deeds of trust cannot be arrived at by comparing such deeds with mortgages. The two subjects are governed by separate rules and each must stand alone. The rules controlling each must be construed and applied with reference to its own subject solely. We will go into further detail in discussing our First Cause of Action.

(2) THE FIRST CAUSE OF ACTION

For the purpose of determining rights and liabilities under the second deed of trust herein, it is necessary to first consider the legal atmosphere created by the first deed of trust.

(a) Title of First Trustee.

Appellant, Davidow, conveyed to Corporation of America, the first trustee, the title to both pieces of property in fee upon condition subsequent. That is, the first trustee took the title in fee subject to Davidow's right to pay off his $150,000 obligation and thus have the legal title re-conveyed. C. C. 863.

Regarding the quantum of title so conveyed: A very well considered case is Robinson v. Pierce, 118 Ala. 273. Starting at the bottom of page 289 Mr. Justice Head says:

> It is also laid down, and nowhere disputed, that, "Where an estate is given to trustees, in fee, upon trusts that do not exhaust the whole estate, and a power is superadded which can only be exercised by the trustees

> conveying in fee simple, the trustees will take the fee, and the estate conveyed by them will be sustained by the fee in them, and not by the mere power." 1 Perry on Trusts, S. 316.

Also the case of Briggs v. Davis, 20 N. Y. 15; and especially the opinion of Mr. Justice Denio on the re-argument of the case, reported in 21 N. Y. 574, 575, 576, and 578.

But it is unnecessary to go outside of our own state for the same rule. Judge Kerrigan, concurred in by Judges Waste and Richards, in Bryant v. Hobert, 44 Cal. App. 315, 317, in part says:

> The effect of such a deed (of trust), says the Court in the first of those cases, is to convey the legal title to the trustee, who is thereby vested with the absolute legal title to the premises so far as is necessary to enable him to convey it to the purchaser at the trustee's sale free of all right, title, interest, or estate of the trustors, or anyone claiming under or through them.

However, we are not obliged to quote either text book or court authority. The California statute is clear, unambiguous and controlling here. Stripped of its unnecessary verbiage, it reads as follows:

C. C. 863.

> Every express trust in real property vests the whole estate in the trustees, subject only to the execution of the trust.

This statute, as applied to deeds of trust given as security for a loan, only, serves a double purpose. (a) It declares that a deed of trust conveys the absolute fee title to the trustees who are thereby authorized to convey the title in fee simple absolute

(C. C. 762) in the execution of their trust upon default in the payment by the trustor; and, (b) it retains the equitable or beneficial estate or interest in the real property in the trustor as long as the trust remains executory. "Subject only to the execution of the trust." This portion of the statute has, in a number of the California cases, been overlooked or misconstrued in its application to trust deeds. The duties of trustees under deeds of trust are passive until the happening of either of two events: (1) The discharge of the obligation; or, (2) the default in its payment. Their trust does not require the performance of any service by them, as a rule, until it becomes necessary to terminate their trust by re-conveyance or sale of the property. For such reason, under the statute quoted, the trustor is permitted to treat the property as though he were the owner until the trustees terminate his interest by a conveyance after sale. He retains no estate other than a reversion. (Briggs v. Davis, 20, N. Y. 15; In re-argument 21 N. Y. 574.)

It will be noted that in some of the California cases the authority to sell the property under a deed of trust is likened to "a power in trust" or a power in a mortgage. The trustees, under a trust deed, convey under authority of their express trust, not under a power. Under a mortgage, the authority is merely a *power-of-attorney*. The law governing these two instruments should not be confounded.

(b) Title of Second Trustee.

As we have conclusively shown (1) a deed of trust is a conveyance of the legal title; (2) a conveyance by the trustee is in the execution of his trust and not in the execution of any "power of sale," as under a mortgage; (3) the trustee conveys

the title reposed in him by the deed of trust conveyance, and not the title of the owner.

The first deed of trust conveyed to the first trustee the fee title to both pieces of property upon *condition subsequent*. C. C. 708. We respectfully submit: The second deed of trust conveyed the same title to the second trustee upon *condition precedent*. The condition which would have determined the title in the first trustee was the identical condition which would have, by operation of law, conveyed the same title to the second trustee. That contingent event was the payment, or other disposition, of Davidow's first obligation of $150,000.

The difference between a *reversion* and a *remainder* must be clearly conceived and remembered. The two estates are defined in the California laws and are controlling here. A reversion is thus defined.

C. C. 768.

> A reversion is the residue of an estate left by operation of law in the grantor or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

A remainder is also defined by the Civil Code:

C. C. 769.

> When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.

It is said in 23 R. C. L. 483, Sec. 5:

> Blackstone (2 Com. 163) broadly defines an estate in

> remainder to be "an estate limited to take effect and be enjoyed after another estate is determined."

And cites in support of the section Bunting v. Speek, 41 Kan. 424, 3 L. R. A. 690, 21 Pac. 288.

The same authority (23 R. C. L. 483, Sec. 6) thus clearly distinguishes between the two estates:

> While a remainder is the remnant of the estate which the grantor parts with, the reversion is the remnant left in him which he does not part with. A remainder differs from a reversion in several particulars. A remainder is always created by the act of the parties, while a reversion arises by operation of law. A remainder is a part of the estate given to another, while a reversion is the whole estate after the particular estate shall have expired.

A reading of the second deed of trust herein (Exhibit B, Trans. 33) will disclose two important points: (1) The instrument is in words and figures a *first* deed of trust, being such *second* trust deed, however, in point of time of its delivery; and (2) in its paragraph SIX (Trans. 39) it admits that its granted estate is upon condition precedent in the following language:

> This Deed of Trust is subordinate to prior Deed of Trust executed by same Trustor in the sum of One Hundred and Fifty Thousand Dollars in favor of Bank of America of California, dated June 17th, 1930, with interest thereon from May 1st, 1930.

From these facts it becomes conclusive that the estate granted this second trustee was a *conditional contingent remainder* in fee—a conditional fee limited upon a fee. In support of this assertion, the following sections of our Civil Code become pertinent and conclusive:

C. C. 707.

The time when the enjoyment of property is to begin or end may be determined by computation, or be made to depend on events. In the latter case, the enjoyment is said to be upon condition.

C. C. 1434.

An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event.

C. C. 1110.

An instrument purporting to be a grant of real property, to take effect upon condition precedent, passes the estate upon the performance of the condition.

C. C. 695.

A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.

C. C. 1436.

A condition precedent is one which is to be performed before some right dependent thereon accrues.

C. C. 778.

A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation.

C. C. 773.

Remainders, Future and Contingent Estates, how created. Subject to the rules of this title, and of part one of this division, . . . a fee may be limited on a fee, upon a

> contingency, which, if it should occur, must happen within the period prescribed in this title.

Harder v. Matthews, 309 Ill. 548, 557; Barry v. All Persons, 158 Cal. 435, 111 Pac. 249.

The first deed of trust was delivered upon June 17th, 1930, and the note would not become due until June, 17th, 1931. (Trans. 21-22, Par. II.) Lachman, through its dummy Anderson, instituted execution proceedings on its second deed of trust upon February 20th, 1931. (Trans. 14, Par. X.) At that time the fee title in the two pieces of property covered by both trust deeds was in the first trustee, and the second trustee's interest could not "take effect" prior to the termination of that estate. To repeat:

C. C. 1110.

> An instrument purporting to be a grant of real property, to take effect upon condition precedent, passes the estate upon the performance of the condition.

Mesick v. Sunderland, 6 Cal. 297, 315.

The first trust deed has never been executed or the obligation for which it is security paid or otherwise discharged. (Trans. 21, Par. II.)

It will therefore be seen that although Lachman's *cause* of action which is based upon matters of fact, had accrued by the maturity of Davidow's $25,000 note, the *right* of action, which is founded upon matter of law, could not become vested as long as the first deed of trust remained executory. In this connection, it should be remembered that a beneficiary, under the California trust deed law, must first exhaust his security before he may

hold the maker of the note personally. See Bank of Italy vs. Bentley, 217 Cal. 644, where the State Supreme Court says, on page 658:

> Considering all these factors, and particularly the anomalous nature of deeds of trust in this state, it must be held that, either by reason of implied agreement or by reason of public policy, the holder of a note secured by a deed of trust must first exhaust the security before resorting to the personal liability of the trustor.

It is said in 1 Bancroft's Code Practice and Remedies, 330, Sec. 214:

> If there is no right of vindication, or restoration, or recovery for a liability except upon some condition precedent, such condition goes, not to the remedy merely, but to the cause of action itself, and until performance of the condition no cause of action exists.

The author has used the term *cause of action* in the same sense as we used *right of action, supra.*

Neither Anderson's nor the second trustee's right (or cause) of action having matured, their attempted execution of appellant's second trust deed was premature and the deed of the trustee to Anderson passed no interest or estate in equity, and Anderson's deed to Lachman amounted to nought. The second trustee has never had a vested interest in the property. To repeat:

C. C. 695.

> A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.

Morse v. Steele, 132 Cal. 456; 64 P. 690.

It was said by Judge Chipman, in Estate of Washburn, 11 Cal. App. 735, on page 740:

> The broad distinction between vested and contingent remainders is this: In the first, there is some person *in esse* known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose *right* to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. It may never happen, or it may not happen until after the particular estate upon which it depends shall have been terminated, so that the estate in remainder will never take effect. (2 Washburn on Real Property, Sec. 1332.)

And on page 741 he says, further:

> In all cases it is the intention, expressed in the instrument creating the expectant estate, that is to govern, and, therefore, if the language employed shows an intention to postpone the vesting until the happening of a certain event, it is contingent. (24 Am. & Eng. Ency. of Law, 2nd ed., p. 392, and cases noted.)

See, also, Taylor v. McCowan, 154 Cal. 798, p. 804, and cases cited. In the case before us, the deed of trust expressly recites that it is "subordinate" to the first deed of trust. (Trans. 39, Sec. SIX.) The word "subordinate" means (Century Dictionary):

> 1. In a lower order or class; occupying a lower position in a descending scale; secondary.

The uncertainty of Davidow's obligation to Bank of America of California being paid or otherwise discharged other than by an execution of the first deed of trust certainly made the estate of the second trustee in the properties contingent. For this reason the second trustee was at no time vested with any interest or estate *in presenti* in the properties it endeavored to execute upon.

Nevertheless, the deed of the second trustee to Anderson, and Anderson's deed to Lachman passed the contingent legal title in remainder to both properties.

Savings & L. Soc. v. Deering, 66 Cal. 281, 286. 287.

To avoid repetition, this subject will be concluded under the following sub-head.

(3) THE SECOND CAUSE OF ACTION

We have hereinbefore shown that Lachman acquired no interest whatsoever in either of the properties involved herein by its execution of the second deed of trust. Had Lachman's unlawful actions regarding these properties stopped after the deed of Anderson to it, appellant would have no cause of action against the parties interested in the first deed of trust. But since Lachman's avarice and desire to acquire the whole of appellant's interest in these properties overcame its caution to abide by legal principles, these parties are necessarily brought in to adjudicate appellant's complete rights in and to his said properties and to quiet his title to them. Having participated in Lachman's ill-gotten gains, the Bank became a party to Lachman's fraudulent conversion of appellant's property.

Bahen v. Furley, 44 Cal. App. 134, 136 (1).

We next find this Investment Corporation illegally negotiating with the beneficiary under the first deed of trust to illegally cause to be released to it the Napa County estate of appellant, the legal title to which was reposed in its trustee under the first deed of trust conveyance.

We find the temptation of the amount offered for such a

conveyance, viz: $25,000, too great for the first beneficiary to refuse. Disregarding all legal rights of appellant, we find this first beneficiary, Bank of America of California, acceding to the illegal proposal, accepting the offered consideration, $25,000, and illegally instructing its trustee Corporation of America to execute and deliver its deed to the Napa County properties to the appellee Lachman. By reason of this conveyance, we respectfully submit, appellee Lachman Bros. Investment Co. is now in possession of the entire legal title in fee to the Napa County properties, and the only way to compel a reconveyance to appellant herein is by this bill in equity.

We further submit that in order to adjudicate these questions in this equitable action it is necessary to make all the parties to the first deed of trust parties defendant herein and to have this court in this proceeding and at this time adjudge the breach of contract by the beneficiary under the first deed of trust, and to apply the legal liabilities for such breach to which the law makes said appellees subject.

The contract represented by the first deed of trust covered the two separate and distinct pieces of real property in blanket form; and, for such reason was an entire contract. When the beneficiary Bank of America of California entered into the contract with appellee Lachman for the release of part of this property without the knowledge or consent of appellant, the trustor, it thereby breached its contract with appellant and laid itself liable to the penalty for such breach as is provided under the laws of the State of California.

Not having foreclosed a lien, as it supposed, and not having obtained the legal title to the properties, as it concluded it had

when it executed its second deed of trust, nevertheless Lachman proceeded to negotiate with the Bank of America just as though Davidow was completely out of the picture. Such negotiations resulted in Lachman Bros. Investment Co. paying the Bank the sum of $25,000 on Davidow's $150,000 obligation for the release of the Napa County property from the first deed of trust which resulted in the transfer of the legal title of that property from Corporation of America, trustee, to Lachman. This transfer of title amounted to an absolute breach of trust by Corporation of America, as it was executed without the knowledge or consent of Davidow. To this breach of contract both Lachman and Bank of America of California were parties—both stand in *pari delicto*. This action of the three appellees amounted to an unlawful conspiracy to deprive (or defraud) appellant. For such wrong neither appellee Bank of America of California nor appellee Lachman can enforce its obligation against either the primary debtor, the properties, nor against appellant Davidow, personally, their secondary debtor, or surety.

Bank of Italy v. Bentley, (*supra*);

C. C. 2844.

> Surety has Rights of Guarantor. A surety has all the rights of a guarantor, whether he become personally responsible or not.

C. C. 2819.

> What dealings with Debtor exonerates Guarantor. A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended.

Crisman v. Laterman, 149 Cal. 647, and cases cited p 651; C. C. 2840; C. C. 2850.

Supported by abundant authority, the text in 27 Am. & Eng. Ency. of Law (2d Ed.) 255 reads:

> One who advances money to pay the debt of another, in the absence of agreement, express or emplied, for subrogation, will not be entitled to succeed to the rights and remedies of the creditor so paid unless there is some obligation, interest or right, legal or equitable, on the part of such person in respect of the matter concerning which the advance is made, as otherwise he is a stranger, a volunteer, an intermedler, to whom the equitable right of subrogation is never accorded.

See also, Brown v. Rouse, 125 Cal. 645, 651; 58 P. 267.

Let us examine, first, the effect of this breach of Davidow's first deed of trust upon his $150,000 note obligation.

When the Bank received the $25,000 from Lachman it instructed the trustee, Corporation of America, to release to Lachman the Napa County property, which the latter thereupon did. This left only the San Francisco property subject to the deed of trust. By this instruction the Bank, as Davidow's creditor, thus put it out of the power of the trustee to execute its trust, either by reconveyance to Davidow in the event of payment of the obligation or by sale of the property upon default. (It should here be noted that both trust deeds covered both pieces of property in blanket form.) The penalty provided by statute for such a wrong is found in Civ. Code 1512, which reads as follows:

1512. EFFECT OF PREVENTION OF PERFOR-

> MANCE. If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties.

Houghton v. Steele, 58 Cal. 421; 9 Cal. Jur. 348, Sec. 203.

Which means, in the case before us, that Davidow is entitled to have the court regard the $150,000 obligation paid and direct the trustee to convey the legal title of record to him. The rule in such cases is thus stated by the California Supreme Court:

> If one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable for the breach, without demand, even though the time specified for performance has not expired. (Bishop on Contracts Sec. 1426.)

Such is the text from *Bishop on Contracts,* quoted in Wolf v. Marsh, 54 Cal. 228, opinion by Mr. Justice Sharpsteen, and again in the case of Poirier v. Gravel, 88 Cal. 79. The third syllabus in Dunn v. Daly, 78 Cal. 640, reads:

> When an entire contract is broken by one party, it is optional with the other party to refuse to go on with the contract thereafter.

For other cases in point, see:

> 1 Re-Statement of the Law of Contracts, 468, Sec. 315; Underhill on Trusts and Tr'ees, Am. Ed. p. 453; (same) 8th Ed. Art. 91 p. 478; Art 101 p. 515; Cowper v. Stoneham, 68 The Law Times, 18 (1893); Lovell v. Ins. Co., 111 U. S. 264; 28 L. Ed. 423; Robertson v. Bd. of Com., (Kan.) 113 Pac. 413; Saar v. Weeks, (Wash.) 178 Pac. 819; Johnson v. Knappe, (S. D.) 123 N. W. 857;

Also the following California cases:

> Twomey v. Peoples Ice Co., 66 Cal. 233; 5 Pac. 158; Haskell v. McHenry, 4 Cal. 411; McConnell v. Corona Co., 149 Cal. 60, pp. 64-5; Alderson v. Houston, 154 Cal. 1; 96 Pac. 884; DeProsse v. Royal Eagle, 135 Cal. 408; 67 Pac. 502; Central Oil Co. v. So. Ref. Co., 154 Cal. 156; Ratzlaff v. Trainer—D. Co., 41 Cal. App. 586, 591.

Defendants contend that in as much as the trustee executed the deed of release to "whom-so-ever is entitled thereto," or words to that effect, that they are not liable as for a breach. This is a mere quibble. Lachman paid the $25,000 consideration for the release, the Bank accepted the same and instructed the trustee to realease the property to Lachman. The Complaint shows that this deed of partial release was filed for record at the request of defendant Lachman Bros. Investment Co. If an error was made by the trustee in naming the grantee in the deed, the defendants are surely estopped from denying their own wrong. It was the intention of all three appellees to release the legal title to this property to Lachman Bro.'s Investment Co.

Bank of America cannot consistently urge that it did not know that Lachman was not the legal owner of these properties. If they took Lachman's word that he was such legal owner and failed to examine into the execution record and apply the law and draw their own conclusions, they were guilty of gross negligence and must now suffer for their own carelessness. Davidow is the sole innocent party and the victim of the ignorance or carelessness of defendant Bank of America of California. The general rule governing such stupidity, if we may be allowed to use the expression, is thus stated by the

California Supreme Court in the case of Wittenbrock v. Parker, 102 Cal. 93, p. 105:

> The case presented is this: Plaintiff and Bithell are both innocent parties. Plaintiff had a prior mortgage which he by mistake satisfied in full without reading the satisfaction. This was negligence on his part, and as one of two innocent parties must suffer as a consequence of such negligence, it is equitable and just that the loss should fall upon the plaintiff by whose negligence the mishap was brought about. (Schultz v. McLean, 93 Cal. 356; Somes v. Brewer, 2 Pick. 201; 13 Am. Dec. 406; Mundorf v. Wickersham, 63 Pa. St. 87; 3 Am. Rep. 531; Civ. Code S. 3543).

For other cases in point, see Note, 5 L. R. A., N. S. 799.

Secondly, let us enquire into Lachman Bros. Inv. Co.'s position under the circumstances disclosed: Lachman's participation in the breach of the first deed of trust puts that corporation in the same relative position, with reference to the legal penalties to be imposed, as its co-tort-feasor, Bank of America of California.

Lachman was in *pari delicto* with the Bank in this breach of trust, a contract to which it was neither a party nor to which it was privy. By this breach of contract Lachman became vested with the legal title to the Napa County property without the knowledge or consent of Davidow, the trustor under that deed of trust. Lachman by reason of its wrongful act has now become the trustee *de son tort* for Davidow, and must account to Davidow for the rents and profits and convey to Davidow the legal title.

Mr. Justice Olney, in Brazil v. Silva, 181 Cal. 490, on page 494, says:

> Now it is to be noted that the opinion quoted does not controvert, as it could not well do, the general principle upon which relief is asked for in such cases as the present, namely, that where the defendant has, by his own wrong obtained the legal title to property, a trust as to such property will be imposed upon him in favor of the party injured. This principle is a familiar one and is based upon the maxim, which has been carried into our code (Civ. Code, sec. 3517), that no one may profit by his own wrong. The instances of its application are as various nearly as the ways in which property can be wrongfully acquired. A most common illustration is the imposition of a trust upon a party holding under a deed fraudulently obtained from the grantor, where admittedly the deed is valid to the extent of conveying the legal title.

This same doctrine is further expounded by Mr. Justice Richards in England v. Winslow, 196 Cal. 260, page 267, where that eminent jurist in part says:

> (3) One who has assumed the relation and undertaken to act in the capacity of a trustee and who has thereby come into the possession and control of the money or property of another cannot be heard to deny the validity of the trust under which he has admittedly acted and the benefits of which he has received and holds.

And a little further on, quoting from a New York case:

> "It is a well settled rule in the law of trusts that if a person not being in fact a trustee acts as such by mistake or intentionally, he thereby becomes a trustee *de son tort*. The rule is thus laid down by a recent writer: 'A person may become a trustee by construction, by intermedling with and assuming the management of property without authority. Such persons are trustees *de son tort* as persons who assume to deal with a deceased person's estate without authority are administrators *de son tort*.—During the possession and management by such constructive trustees they are subject to the same rules and remedies as other

> trustees.' . . . It is plain that this branch of the law does not rest on the strict ground of estoppel as usually expounded in the law books. It rather depends upon a principle of public policy connected with the right administration of justice (1 Greenl, on Ev. Sec. 210.) The principle to be extracted from the cases is that the party acting as trustee shall not be allowed, in a court of justice, to set up, as against parties interested in the administration of the trust, a state of things inconsistent with his assumed character."

Lachman, through its dummy, Anderson, executed the Anderson second deed of trust. It was therefore in possession of all the facts regarding the same. When it paid Bank of America of California the $25,000 for the release of the Napa County lands from the first deed of trust, which we have shown it had no legal right to do, it was laboring under a mistake of law. Such payment to the Bank was, in the eyes of the law, a voluntary payment. Such payment cannot be recovered. The following cases are uniform to this effect and the rule is universal. This payment was made by Lachman on Davidow's obligation. The Bank now has and retains this money. However, the Bank having come into this money by reason of its own wrong—by reason of its own breach of contract—it cannot retain the same. Otherwise, it would be taking advantage of its own wrong. (Civ. Code 3517.) We respectfully submit that Davidow is entitled to judgment against the appellee Bank of America of California and its successor, appellee Bank of America National Trust and Savings Association, for this money. It was paid on Davidow's obligation and is legally his money. The following cases sustain our contention: The general rule is thus restated in Taylor v. First Nat. Bank, 212 Fed. 898, p. 902:

> As Mr. Justice Bradley said in Lamborn v. County Commissioners, 97 U. S. 181, 185 (24 L. Ed. 926): "A voluntary payment, made with a full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, cannot be revoked, and money so paid cannot be recovered back."
>
> Brown v. Rouse, 125 Cal. 645, 651; Harrison v. Barrett, 99 Cal. 607, p. 611; 34 P. 342; Leahy v. Warden, 163 Cal. 178; Burke v. Gould, 105 Cal. 277, p. 283; Hanford Gas. Co. v. Hanford, 163 Cal. 108, p. 112; First Nat. Bank v. Thompson, 212 Cal. 388; Still v. Saunders, 8 Cal. 281, p. 287; Smith v. McDougal, 2 Cal. 586; Brumagim v. Tillinghast, 18 Cal. 265; Garrison v. Tillinghast, 18 Cal. 404; 21 R. C. L. p. 173, Secs. 203, 204, title "Payment" 53 A. L. R. p. 949, Note.

If the Bank could authorize the trustee to release one piece of property from its obligation under the first deed of trust for $25,000 without going through the formality of a public sale, it could release the other piece in the same manner and for the same consideration, $25,000, and then bring suit against Davidow for the $100,000 deficiency. Does such a self evident absurdity need argument?

As we have hereinbefore shown, the property conveyed as security by deed of trust is the primary debtor; that when the primary debtor has been released without fault on the part of the secondary debtor—the maker of the note—the latter, being regarded as the surety, is thereby released from his obligation. (Bank of Italy v. Bentley, supra). For this reason Davidow is entitled to a permanent injunction against the Bank enjoining it from bringing action against him upon his note.

Cresman v. Laterman, 149 Cal. 647, 651.

By Lachman's wrongful participation in the breach of the first deed of trust, Davidow is now entitled to have the legal

title to the Napa County property conveyed to him by the Lachman corporation. When that conveyance shall have been made the contingent remainder estate upon which the second trust depended for its security will be merged with the balance of the legal title in Davidow. In other words, Lachman's primary security, through its own wrong, will be extinct. From what we have before shown, Lachman, by its own fault, having extinguished its primary debtor, has automatically discharged the surety on the note—Davidow.

We will go further into this subject under our next subdivision.

(4) LEGAL EFFECT OF LACHMAN'S FRAUDULENT ACTS

The allegations in the bill regarding Lachman's deceit and fraudulent practices in its illegal attempts to confiscate the properties of appellant were not injected for the purpose of merely embellishing appellant's causes of action. These fraudulent practices started when Lachman deliberately breached its two promises to renew its loan. These promises were both based upon valuable considerations.

Weinstein v. Moers, 207 Cal. 534, 542.

Right here we might say that it is the unwritten custom between borrower and lender of these large sums upon real estate security to renew the same when due as long as the security is good and its income pays interest, taxes, etc. If this were not so, the banks which lend these large sums upon only one year obligations would soon own all the real property, or practically all, in their immediate vicinity. Of these facts the courts will take judicial knowledge. The Lachman loan under the second

trust deed was upon a six months' note at twelve per cent. In itself an evidence of greed.

The next fraudulent and deceitful act practiced by Lachman was its execution of its second deed of trust before it had any right so to do.

Its third fraudulent act in this process of illegal confiscation consisted in its wrongful negotiation with appellee Bank of America resulting in the legal title to the Napa County properties being transferred for the sum of $25,000.

Let us examine into the legal aspects of these two last mentioned fraudulent transactions.

It is appellant's contention that when Lachman induced the second trustee to breach its trust by executing the second deed of trust, and by such breach of trust itself assuming to become the holder of the legal title to the properties, it thereby terminated the trust and in so doing breached its contract with appellant. By its voluntary act it is now estopped to deny such termination. For all of which it is now liable to such penalties as are provided by the laws of the State of California.

When Davidow delivered his second deed of trust he reserved unto himself two separate and distinct rights: The first was his right to pay off his $25,000 obligation and have the properties re-conveyed by the trustee; the second was his right to compel the beneficiary to first look to the property for its reimbursement. Bank of Italy v. Bentley, supra.

When Lachman illegally caused its second deed of trust to be executed before its right to do so had accrued, it thereby

made it impossible for appellant, the trustor, to either pay off his obligation and have the properties re-conveyed by his trustee, or to compel the trustee to sell the securities for the purpose of satisfying his obligation.

There are certain California statutory rules of law which are applicable to this state of facts: The first is:

C. C. 870.

> Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the trustees, in contravention of the trust, is absolutely void.

And also:

C. C. 2244.

> One who actually and in good faith transfers any money or other property to a trustee, as such, is not bound to see to the application thereof, and his rights can in no way be prejudiced by a mis-application thereof by the trustee.

And also:

C. C. 2224.

> One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

And also:

C. C. 2223.

> One who wrongfully detains a thing is an involuntary trustee thereof for the benefit of the owner.

We respectfully submit that Davidow, appellant here, the innocent victim of these grasping, fraudulent acts of Lachman's,

is the only one who can take advantage of these laws. The deed of the second trustee to Anderson, being in contravention of the trust reposed in it by Davidow, is absolutely void, in so far as appellant is concerned. Lachman, on the other hand, being the perpetrator of this fraud and thereby being also guilty of breach of contract, cannot now hide behind this statute. Lachman is estopped to plead the illegality of the trustee's deed. By its execution Lachman has extinguished the trust at law and is bound by this action here. This statute was not intended to be a shield for fraud, deceit and illegal actions. Mr. Justice Olney, in Brazil v. Silva, 181 Cal. 490, on page 495, says:

> But the position so taken is not sound. It is in fact directly contrary to the established rule of equity. It is a familiar function of equity and one very characteristic of its peculiar province, to refuse to permit and affirmatively to prevent, a statute being used as a means whereby to perpetrate a wrong.

England v. Winslow, 196 Cal. 260, 272 (7).

Lachman's breach of contract consisted in its execution of the second deed of trust and its instruction to the second trustee to proceed with the sale and execution of its deed, thereby breaching the trust reposed in it by the trustor, Davidow. That such action on the part of Lachman amounted to a breach of contract is thus stated in 1 Re-Statement of the Law of Contracts 468, Sec. 315, as follows:

> Breach by Preventing or Hindering Performance by the Other Party.
>
> (1) Prevention or hinderance by a party to a contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party, or the discharge of a duty by him, is a breach of contract.

Wolf v. Marsh, 54 Cal. 228, 232.

Lachman, by its illegal execution of the second deed of trust through its dummy beneficiary and the trustee, thereby prevented Davidow from discharging his duty of paying off his obligation or insisting upon a sale of the properties by the trustee under the trust. Lachman became the holder of the legal title to the contigent estate through its own wrong, thereby extinguishing the trust at law. Davidow can now obtain his rights in equity only.

C. C. 2279.

> A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful.

C. C. 871.

> When the purpose for which an express trust was created ceases, the estate of the trustee also ceases.

C. C. 2223.

> One who wrongfully detains a thing is a voluntary trustee thereof for the benefit of the owner.

As we have before shown, Davidow was not in default under either of his deeds of trust at the time the second trust deed was executed.

Let us repeat the statutory law governing the liability for such breach and prevention of performance. It is:

C. C. 1512.

> Effect of Prevention of Performance. If the performance of an obligation be prevented by the creditor the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties.

No interpretation is necessary to decipher the meaning of

this perspicuous statute. Davidow in this action is entitled to a decree annulling and voiding his second deed of trust and promissory note and to have them surrendered up for cancellation under C. C. 3412.

So much for appellee Lachman's fraudulent acts in-so-far as the second deed of trust herein involved is concerned.

Let us next look into the legal effect of Lachman's fraudulent and illegal attempts at confiscation as they affect appellant's first deed of trust:

As we have shown, when Lachman instituted its negotiations with the Bank for a conveyance from the first trustee of the legal title to the Napa County properties for a consideration of $25,000, it had no right, title, estate or interest in either of said properties except that it was the holder of the legal title of the remainder estate as a trustee *de son tort* for Davidow. When, therefore, it instituted these illegal negotiations it became an intermeddler in a contract to which it was neither a party nor to which it was privy. Such an intermeddler has no standing in the eyes of the law and can acquire no interest whatsoever by subrogation in equity or otherwise to the property conveyed, but becomes merely a trustee *de son tort* of the legal title for the equitable owner.

Let us next inquire into the legal effect this illegal transaction has had upon the rights of the beneficiary under the first deed of trust, the appellee Bank of America.

When this first beneficiary induced Davidow's trustee, Corporation of America, to execute and deliver to appellee Lachman its deed to the Napa County properties it not only put it

out of the power of the trustee to execute the trust reposed in it by Davidow, which in itself amounted to a breach of contract, but it also breached an entire contract by causing to be conveyed one of the two pieces of property covered in blanket form by the trust deed. By this double breach of contract it has now made itself liable to the same penalties hereinbefore referred to and cited regarding the breach of contract and prevention of performance by Lachman under the second deed of trust. So that now, under those same rules of law, this appellant is entitled to a cancellation of both his first deed of trust and his notes evidencing his $150,000 obligation, and to the surrender for cancellation of both of those instruments. Having participated in the fruits of Lachman's fraud, the Bank has become a party thereto.

Bahen v. Furley, 44 Cal. App. 134, 136 (1).

There is still another view to be taken of this illegal breaching of the first trust agreement. Lachman was a party to that breach, and actually participated in it. By reason of such wrong Lachman has made it impossible for the first trustee to execute its trust. By reason of such prevention, the contingency upon which the estate of the second trustee depended has been made impossible of performance. That is, Davidow has been prevented from paying off his obligation. The principal having been discharged by Lachman's own wrongful act, the surety—Davidow—is also discharged from his personal obligation under his second deed of trust.

9 Cal. Jur. 348, Sec. 203; Houghton v. Steele, 58 Cal. 421.

(5) THE FEDERAL QUESTIONS INVOLVED

The two Federal questions to be raised are governed by the same principles of law. They involve two separate statutes so will be discussed separately. They are both founded upon appellant's constitutional rights under the XIV Amendment to the Federal Constitution.

(A) The first one which we will discuss has to do with the construction placed upon Section 2924 of the California Civil Code by appellees in their execution of appellant's second deed of trust.

(B) The second question has to do with the construction placed upon Section 692 of the California Civil Code of Procedure by appellees in the same proceeding.

(A) It is almost impossible to decipher the real meaning of C. C. 2924 as it appears in the Code. For that reason we have stripped the section of its unnecessary verbiage. In its naked form it reads as follows:

C. C. 2924.

> Where, in any transfer in trust of *any estate* in real property to secure the performance of an obligation, a power of sale is conferred upon the trustee to be exercised after a breach of the obligation for which such transfer is a security, such power shall not be exercised until (a) the trustee or beneficiary shall first file for record in the office of the recorder of the county wherein the *trust property* is situated a notice identifying the deed of trust and giving the book and page where the same is recorded or a description of the *trust property* and containing a statement that a breach of the obligation for which such transfer in trust is security has occurred, and of his election to sell or cause to be sold *such property* to satisfy the obligation; (b) not

> less than three months shall thereafter elapse; and (c) the trustee shall give notice of the time and place *thereof* in the manner and for a time not less than that required by law for sales of real property upon execution.

We wish to particularly call to the attention of the court the express wording of the act: When *any estate* in real property is conveyed in trust as security for a loan, upon breach of the obligation the trustee is *authorized to sell the whole trust property*—not merely the estate therein conveyed in trust.

The case now before this court is an excellent example to illustrate the unconstitutionality of this law as construed by appellees.

The estate granted the second trustee by the delivery of the second deed of trust was a conditional contingent remainder. However, it was an "estate in real property" within the meaning of this law, although not a vested estate. (C. C. 769.)

Relying upon this legislative authorization Lachman, through its dummy Anderson, proceeded to sell the trust property to which it had no title or right at that time. Let us look at the recitals of the trustee in its deed of conveyance to Anderson, "Exhibit C," (Trans. 41).

> (b) Said G. P. Anderson has recorded in the office of the City Recorder, etc., etc., notices of such breach and of election to sell, or cause to be sold, *said property* to satisfy said obligation.
>
> (c) Not less than three months elapsed between the recordation of said notices of breach and the posting and first publication of the *notice of sale of said property*.
>
> (d) Said Beneficiary has made due and proper demand upon said Trustee *to make sale of said property* pursuant

to the terms of said Deeds of Trust.

(e) Said Trustee has given notice of the time and place of the said sale *of said property,* etc.

(f) Said *sale of the property* situated in the City and County of San Francisco, State of California, *herein before described,* was made by said Trustee at public auction in the City and County etc., etc., IN FULL COMPLIANCE WITH THE LAWS OF THE STATE OF CALIFORNIA, ETC., ETC.

So, *in full compliance with the laws of the State of California,* this Trustee sold the appellant's property, outside any court proceeding, to which it had no present vested right, title, estate or interest, without the owner's consent, without any notice to him, and without any opportunity given him to protect his rights.

This trustee was undoubtedly laboring under the impression that it was acting under a POWER OF ATTORNEY embraced in the deed of trust and could, as attorney-in-fact for Davidow, transfer the fee simple from Davidow to the purchaser at its sale. However, neither Davidow nor this trustee was possessed of that title, as we have before shown.

We do not contend at this time that Civil Code Section 2924 is unconstitutional as enacted. We do, however, most strenuously contend that as construed by this second trustee it is clearly unconstitutional. Construed as applicable to second deeds of trust, that is while a first trust deed is outstanding, this enactment amounts to an authorization by the state legislature of the taking of one man's property and giving it to another without "due process of law" as forbidden by section 1, of XIV Amendment to the Federal Constitution. As followed

by the trustee in the execution herein involved, it resolves itself into a proceeding in which the state has authorized Title Insurance & Guaranty Co., trustee, to give notice of the sale of appellant's properties, of which it was neither possessed nor authorized, legally, to sell, and then to sell and execute a conveyance to the "purchaser". In short, it is an authorization by the state legislature of the sale of one's property by another who has no legal right so to do.

If Lachman had no right, or cause of action at the time his dummy instituted her execution proceedings, and by reason thereof it obtained no valid title to the properties, just what were this beneficiary's, Lachman's, legal rights—the premises considered?

Among other provisions, the second deed of trust provided, in paragraph ONE, section (b): The trustor agrees to pay all obligations affecting the properties *when due*. (Trans 34.) In paragraph TWO (Trans. 35) the trustee or beneficiary may pay any such obligation upon the failure of trustor to do so. As the obligation under the first trust deed at that time had not matured, neither party could have paid the same under these provisions.

It was Anderson's legal duty to await the maturity of the $150,000 obligation to Bank of America of California; in the event Appellant failed to meet the same promptly, to have served notice upon him to pay the same; in the event of his failure so to do within a reasonable time, to have paid the same and then to have instituted her execution proceedings upon the second deed of trust. In other words, if the trustor failed to remove the contingency upon which her estate depended, it was

her duty to remove the same under the terms of her own agreement. Otherwise, she had no legal right to execute her contract by selling the trust properties.

Lachman is now estopped to deny that this law was not intended to apply to second deeds of trust, as its dummy Anderson elected to execute the Lachman deed of trust under its authority and strictly following its procedural dictates. Her trustee recites in its deed of conveyance to her that it proceeded in its execution of the trust "IN FULL COMPLIANCE WITH THE LAWS OF CALIFORNIA." These were the only "laws" covering her "right" to execute her trust.

This construction put upon C. C. 2924 by both the beneficiary Anderson and the trustee, Title Insurance & Guaranty Company, brings their proceedings under C. C. 2924 squarely within the decisions of the Supreme Court of the United States commented upon and quoted by the author in 1 Willoughby on the Constitution of the United States, second edition, 1928, Secs. 11 and 12, page 15.

As the law governing the point we have just raised also covers the following Federal Question, we here refer to the authorities there cited to avoid repetition.

(B) In the execution of a deed of trust the notice of sale is jurisdictional. If the notice of sale has not been given strictly in accordance with the provisions of the law, the trustee acquires no right to sell the properties. In its attempted execution of the second deed of trust the trustee, Title Insurance & Guaranty Co., in construing Section 692 of the Code of Civil Procedure, misconstrued that section. Its notice of sale was so

defective as to be no notice at all; and its deed to the premises, based upon such notice, has deprived this appellant of his said properties without due process of law as guaranteed by the XIV Amendment to the Federal Constitution. These facts are alleged in paragraph XIII of the Bill of Complaint, (Trans. 17.)

The property covered in the deed of trust consisted of two parcels situated in different counties; and, in reference thereto, was but one subject of an entire contract. That is what is meant herein when we say that the properties were covered "in blanket form." The trustee gave separate notices of sale. The trustee was not authorized to divide the contract. The beneficiary's notice of election to sell the property, recorded in each county, stated that she elected to "sell the property." Such notice did not authorize her trustee to give separate notices of sale. Her contract, "Exhibit B" of the bill, provided: "It (the trustee) shall first give notice of the time and place of such sale in the manner provided by the laws of this state in force at the time of giving such notice . . . " (Trans. 37.) That law was C. C. P. 692 as it read prior to its 1931 amendment. In paragraph 3 of that section it is provided that in case of the sale of real property the notice shall be given by the posting of a notice "*particularly describing the property,*" which notice shall also be published in a newspaper printed and published in the city where the property is situate.

The trustee construed this law as authorizing it to give separate notice for each parcel. Such construction, we contend, deprived this appellant of his property without due process of law.

The execution of a deed of trust is a proceeding outside a court of justice. Such a proceeding is as strictly bound by

rules of procedure as is a similar proceeding in a court of law. There was but one deed of trust; there was but one security; the trustee was authorized to give but one notice of sale. That notice, to be legal, could only describe both parcels. The notice of sale was jurisdictional. The trustee could not lawfully sell until it acquired jurisdiction so to do. The notice was the summons—the original process—and until properly served the trustee was powerless to deliver title. The trustee was not authorized to deal with this property prior to the sale otherwise than as an entity. After acquiring jurisdiction to sell, as the contract, as well as the law, provided, it not only could, but was obliged to, sell in separate parcels. The San Francisco property was sold upon a notice which described that property only. That notice did not authorize its sale and the trustee's deed based upon that notice was void. The same is also true of the Napa County property. (Trans. 16.) This point, alone, will confer jurisdiction upon the Federal courts to accept and retain jurisdiction of this case.

> 3 Jones on Mortgages (8th Ed.) Secs. 2361, 2393-4, pp. 1852-3. Fowle v. Merrill, 92 Mass. 350; Smith v. Provin, 86 Mass. 516; Donohue v. Chase, 130 Mass. 137, 138; Torry v. Cook, 116 Mass. 163, 165; Burnett v. Denniston, 5 John. Ch. (N. Y.) 35; Fenner v. Tucker, 6 R. I. 551; Shillaber v. Robinson, 97 U. S. 68; 24 Law Ed. 967; Bigler v. Waller, 14 Wall (U. S.) 297; 20 Law Ed. 891; Winbigler v. Sherman, 175 Cal. 270; 272; Higbee v. Chadwick, (C. C. A. 6) 220 Fed. 873, 875 (5).

We respectfully submit that this construction placed upon C. C. P. 692 has deprived this appellant of his property without due process of law. That the sale under the construction placed upon this statute has been a "taking" by authority of the laws of the State of California.

(C) Civil Code Section 2924 is void upon its face, and for such reason appellant has been deprived of his property without due process of law as guaranteed by the Federal Constitution, Amendment XIV. The Bill of Complaint alleges this ground of Federal jurisdiction in its XIV paragraph. (Trans. 18.)

Section 24, of Article IV of the state constitution provides:

> Every act shall embrace but one subject, which shall be expressed in its title. xx

Section 22, of Article I, of the same constitution provides:

> The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

The unconstitutionality of this section of the Civil Code was created by the act of the 1917 legislature which re-enacted the section under the title: "An act to amend section 2924 of the Civil Code, relating to mortgages and deeds of trust." (Laws 1917, p. 300.)

(1) In the first place, this 1917 law was *not* an amendment of the section. The section was re-enacted verbatim and the unconstitutional features added.

(2) This section, prior to this "amendment", did not relate to "mortgages and deeds of trust", as the title recites, but only to mortgages.

(3) There are clearly two subjects contained in this 1917 so-called amendment, viz., (a) a procedural act relating to the foreclosure of mortgages containing a power of sale, and (b) a

procedural act relating to the execution of deeds of trust. The subject of mortgages does not include the subject of deeds of trust. The converse is also true. Under this act we find a mandatory provision, a provision which, if not complied with, will void all executions of deeds of trust, under the title "Lien", subtitle "Mortgage". The subject of trusts is under the title "Trusts", and is found in sections 2215 - 2289 of the Civil Code.

The reason for the constitutional provision is well illustrated in the title of the act: "relating to mortgages and deeds of trust". Under such a general title the legislature could include any matter relating to the two subjects mentioned.

In Lewis v. Dunne, 134 Cal. 291, the state supreme court, on page 295, says:

> The word "subject" is used in the constitution in its ordinary sense; and when it says that an act shall embrace but "one subject", it necessarily implies—what everybody knows—that there are numerous subjects of legislation, and declares that only one of these subjects shall be embraced in any one act. All subjects cannot be conjured into one subject by the mere magic of a word in a title.

We respectfully submit, that when appellees endeavored to execute appellant's second deed of trust under the provisions of this section, and under such proceedings took possession of his property and collected the rentals therefrom, that they thereby deprived him of his said property without due process of law, since the said section was void and of no force or effect for any purpose.

Wofford Oil Co v Smith,263 Fed 396,403(3)(4);
Resley v Utica, 173 Fed 502, 509-510;
(Both cases citing:)
Siler v Louisville & N.RR.Co, 213 US 175,

The following authorities govern the two Federal questions above discussed:

> Without the guarantee of "due process" the right to private property cannot be said to exist, in the sense in which it is known to our laws. * * * Whatever else may be uncertain about the definition of the term "due process of law" all authorities of law agree that it inhibits the taking of one man's property and giving it to another contrary to settled usages, modes of procedure, and without notice or an opportunity for a hearing."
>
> Ochoa v. Hernandez, 230 U. S. 139, 161; 57 Law Ed. 1427.

> It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution.
>
> So. Ry. v. King, U. S. 524, 534; 54 L. Ed. 868.
>
> The proposition, if carried out in this case, would, in effect, take away one man's property and give it to another. And the deprivation would be "without due process of law." This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the states and the nation.
>
> Osborn v. Nicholson, 13 Wall (80 U. S.) 654; 20 L. Ed. 689.

The author in 1 Willoughby on the Constitution of the U. S. 2nd Ed. p. 15, Sec. 11, says:

> The question as to the constitutionality of law does not, in all cases, go to the essential validity of the law, that is, as applicable to any and all conditions, but may depend upon the particular facts to which it is sought to be applied. Thus, in Poindexter v. Greenhow, the court said:

"and it is no objection to the remedy in such cases, that the statute whose application in the particular case is sought to be restrained is not void upon its face, but is complained of only because its operation in the particular instance marks a violation of a constitutional right; for the cases are numerous, where the tax laws of a state, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violation of contracts prohibited by the constitution, or because in some other way they operate to deprive the party complaining, of a right secured to him by the constitution of the United States." Thus, the cases are numerous in which the Supreme Court, in holding particular statutes unconstitutional, has qualified or explained this holding by declaring that the statutes "as construed and applied" are thus to be deemed unconstitutional.

See also:

1 Willoughby, Sec. 12, p. 17; Dutton Phos. Co. v. Priest, 67 Fla. 370, and cases cited on page 378; 65 So. 282. Castillo v. McConnico, 168 U. S. 680; Bellingham, etc. v. New Whatcom, 172 U. S. 314; 43 L. 460.

(6) EQUITY PRINCIPLES INVOLVED

(a) The relief herein sought is cognizable in equity only. It is universally held that a trustee's deed, regardless of its illegality, is good in law and is subject to impeachment in equity only.

Brazil v. Silva, 181 Cal. 490, 494; Convoy v. Trautman, 7 Ired, 155; Robinson v. Pierce, 118 Ala. 273; Shortz v. Unangast, 3 Watts & S. 55; 1 Perry on Trusts, Secs. 321, 334; Hill on Trustees, 778; 26 R. C. L. 1299 Sec. 151; Scott v. Sierra Lbr. Co., 67 Cal. 71, 75; Schlesinger v. Mallard, 70 Cal. 326, 334.

In this last case it was said:

> "This is an action in equity against the trustees charging both a breach and a completion of the trust, and seeking for either or both of such causes to compel him to convey the title, for the want of which it was held the plaintiff could not recover in the action of ejectment."

(b) A court of equity assuming jurisdiction for one purpose will retain it for all purposes.

This court, acquiring jurisdiction to compel Lachman to reconvey the legal title to Davidow, will adjudicate the voluntary payment of the $25,000 from Lachman to the Bank and also the breach of contract and trust upon the part of the appellees Bank and Corporation of America.

Havemeyer v. Sup. Ct., 84 Cal. 327, 395, 18 ASR 192, 10 LRA627.

Hartford Ac. etc. v. So. Pac. Co., 273 U. S. 207, 217; 71 L. Ed. 612.

U. S. v. U. P. Ry. Co., 160 U. S. 1, 50-52; 40 L. Ed. 319; 16 S. Ct. 190.

McGowan v. Parish, 237 U. S. 285, 291-292.

(c) Equity follows the law.

Under the Federal equity principles where the facts in the case are governed by direct statutory provisions a court of equity must apply such statutory rules and is not authorized to depart from them.

The facts in the instant case are practically all governed by

the written law of California. This court sitting as a Federal equity court is bound by these statutes and cannot disregard them. This rule of law as annunciated by Judge Story is thus quoted in the case of Nu-Grape Bottling Co. v. Comati, 40 Fed. 2d, 187, 189:

> "Where a rule, either of the common or of the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it." Story's Jurispr. (11th Ed.) Vol. 1, Sec. 64. Also Pomeroy's Equity Jurisprudence (4th Ed.) Vol. 1, Sec. 425; Hedges v. Dixon County, 150 U. S. 182, 192, 14 S. Ct. 71, 37 L. Ed. 1044; Magniac et al v. Thomson, 15 How. (56 U. S.) 281, 299, 14 L. Ed. 696.

(d) The following relief cognizable only in equity is sought herein as shown by the prayer for relief (Trans. 24):

1. A permanent injunction against the appellees restraining the execution of the deeds of trust or the enforcement of the promissory notes of appellant;

2. The surrender up for cancellation of all written instruments of appellant.

3. The execution and delivery to appellant by appellees Lachman and the two trustees of deeds of transfer of the legal title to the properties involved.

4. The appointment of a receiver *pendente lite to* collect and disburse the rents under the direction of the court.

5. Relief for liability caused by the breach of two express trusts.

We respectfully submit that none of these equitable reliefs could be obtained in an action at law.

(e) Appellant comes into equity with clean hands.

At the time of the institution of the execution proceedings of the second deed of trust by Anderson appellant was in default under neither of his deeds of trust.

Crisman v. Laterman, 149 Cal. 647, 651; 117 A. S. R. 167: 87, Pac. 89.
Bank of Italy v. Bentley, *supra.*

(7) APPLICATION FOR A RECEIVER

Plaintiff's application for a receiver *pendente lite* should have been granted. We have conclusively shown herein that Lachman, under the facts alleged in the complaint and not controverted by defendants, has never acquired any interest in the properties involved, nor any right to their possession. However, the facts alleged show that he has illegally taken possession of the San Francisco properties and has collected the rentals therefrom since February 1st, 1932. (Trans. 20, Par. XV.)

We respectfully submit, that the denial of our application by the lower court was not justified by this showing.

It was said by the California District Court of Appeals in the case of Delannoy v. Queto, 73 Cal. App. 627, 636; 239 Pac. 71:

> This rule is generally recognized, that courts have jurisdiction to appoint receivers for the purpose of preserving assets *pendente lite.*

IV.

IN CONCLUSION

Where a trustor fails to meet his obligation and the beneficiary is compelled to execute his deed of trust the trustor, as a rule, suffers a loss of from two to three times the amount of his original loan. We are so familiar with such proceedings that it is seldom we extend our sympathies to the trustor to console him for his loss. We seem to take such proceedings and losses as natural results and look upon the trustor as a more or less incompetent person, and one who *should* be deprived of his properties. When he enters into his contract the trustor does so with his eyes open and if he fails to pay his debt the law prescribes the penalty to be imposed for his breach of contract.

In the case before us we find the conditions reversed. When the deeds of trust involved in this action were entered into all the parties to them knew and understood the law. The deeds of trust were drawn having in contemplation, and as a part of those agreements, the laws of the State of California. It was understood that all the parties entered into the same with the understanding that each would abide by those laws.

What does this record disclose?

Before the trustor was delinquent we find the beneficiary under the second deed of trust deliberately breaching its part of the contract; and, through its inducement, the trustee under that deed of trust deliberately violating its trust; not only the express trust, but the laws of California governing in such cases.

We next find the beneficiaries, under both deeds of trust, conspiring with the trustee under the first deed of trust to breach the first trust deed, and the laws governing, in their attempt to illegally confiscate the lands and premises of the trustor.

The trustor finding himself helpless against the onslaught of these powerful financial interests now throws himself upon the mercy of this court for protection. He has not petitioned this court for any relief other than that which the laws of the State of California have given him as compensation for the wrongs inflicted upon him by the appellees. Had he been delinquent, this court would not have hesitated to impose upon him such penalties as are prescribed by the agreements and the laws governing; we now respectfully submit that this court should impartially enforce the laws governing the facts in this case as the legislature has prescribed.

Should there by any point which we may have inadvertently omitted to cover, or which may be raised for the first time in this case by appellees, we respectfully ask permission of this court to file a reply brief after the oral argument.

Appellant respectfully submits that the decree appealed from should be reversed and the cause remanded for further proceedings in the lower court; and that in its instructions this court should direct the lower court to appoint a receiver *pendente lite* as prayed for in his bill of complaint.

Very respectfully submitted,

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